IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3023 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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Versus

CENTRAL DIRECTOR GUJARAT AGRICULTURAL UNIVERSITY

Appearance:

1. Special Civil Application No. 3023 of 1999

MS SUSHMA SHAH with MR SUNIL K SHAH for Petitioner

MR SA DESAI for Respondent No. 1-2

MR K.L.PANDYA, AGP for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 12/09/2003

ORAL JUDGEMENT

Heard learned advocate Ms. Sushma Shah appearing on behalf of the petitioner, learned advocate Mr.

S.A.Desai appearing on behalf of respondent Nos. 1 & 2 and learned AGP Mr. K.L.Pandya appearing on behalf of respondent No.3.

2. The brief facts of the case are that; the petitioner was appointed as Live Stock Inspector on 18.9.1981 by Central Director, Gujarat Agricultural University, Junagadh. Thereafter, his probation period was over on 26.10.1983. The petitioner has not been promoted and therefore, he requested to the University to transfer him from Junagadh to Sardar Krushi Nagar. His request was considered and accepted by the respondent University and petitioner was transferred by order dated 5.4.1990 from Junagadh to Sardar Krushi Nagar and he reported at the transferred place. Thereafter the State Government has issued the scheme of higher grade on 5.7.1991 which has been accepted by the University on 18.6.1992 and 14.8.1992. But the said Government Resolution dated 5.7.1991 has been retrospectively amended by another Government Resolution dated 16.8.1994, wherein, in para 3(2) it is provided that service rendered by Government employee before request-transfer is not required to be considered for higher pay scale. This being a subject matter of challenge in the petition. Accordingly, petitioner has received higher pay scale benefit by order dated 14.8.1992 and same was withdrawn by the University on 26.2.1999 and recovery order has been passed on 17.3.1999. Therefore, present petition is filed.

3. Initially, this Court has issued rule and interim relief has been granted against the recovery.

4. Learned advocate Ms. Sushma Shah appearing on behalf of the petitioner has submitted that service rendered by the petitioner prior to transfer is now required to be considered for granting the benefit of higher pay scale. She relied upon the recent reported decision of this Court in the case of MULCHANDBHAI LAVJIBHAI PATEL AND OTHERS V. STATE OF GUJARAT AND OTHERS, 2003 (1) G.L.H. 188. The relevant observation made in para 4 is quoted as under:

> "The Centre of controversy as identified in the present petition, is completely covered by a decision of the Supreme Court in the case of Scientific Advisor to Raksha Mantri v. V.M.Joseph, 1998 AIR SCW 2226. In this decision, the Supreme Court has also referred to and relied upon, for the purpose of drawing a parallel, an earlier decision of the Supreme Court reported at

1996(1) SCC 524. In this decision, the Supreme Court has clearly laid down that the eligibility for promotion and seniority are two distinct and different factors. In the said decision the Supreme Court held that where an employee has been transferred to another place on his own request, and the employee has been placed at the bottom of the seniority list at the transferred place, merely on this account the period of service rendered by the employer at the earlier place cannot be excluded from consideration in determining his eligibility for promotion. In other words, the Supreme Court has clearly enunciated the principle that merely on account of request-transfer, in considering the eligibility of the employee for the purpose of any benefits which would otherwise be due to him, his length of service at the place prior to the transfer cannot be excluded. On a correct reading of this decision, it becomes obvious that this is a decision on the basic principles of dealing with the criteria required to be kept in mind while dealing with the eligibility of an employee for certain benefits at the transferred place. While dealing with such criteria, the Supreme Court held that while determining the eligibility of such an employee, the services put in by such employee prior to the transfer, even if the transfer is at his own request, cannot be excluded. Once this principle is accepted, as it must be, it necessarily follows that whether the employee is being considered for promotion or being considered for grant of benefit of the nine years rule, makes no difference whatsoever to the application of the basic principle laid down in this decision."

5. The second grievance which has been raised by the learned advocate Ms. Sushma Shah that order of cancellation or withdrawal of higher pay scale dated 26.2.1999 is passed without giving any reasonable opportunity of hearing to the petitioner and recovery order dated 17.3.1999 is also passed without giving any reasonable opportunity of hearing to the petitioner, therefore, on that ground also both the orders are required to be set aside.

6. Learned advocate Mr. S.A.Desai appearing on behalf of respondent Nos.1 & 2 and learned AGP Mr. K.L.Pandya appearing on behalf of respondent No.3 both are supporting the orders dated 26.2.1999 and 17.3.1999

because, according to Mr. Desai in para 3(2) of the Government Resolution dated 16.8.1994, it is made clear that getting higher pay scale in case of request-transfer, whatever earlier service rendered by the employee, same shall not be required to be considered for higher pay scale, this being the clarification having the retrospective effect of Government Resolution dated 5.7.1991. Therefore, according to Mr. Desai, petitioner is not entitled the benefit of higher pay scale and there is no need to give any reasonable opportunity of hearing to the petitioner before passing such order because, it was, by mistake, the benefit was given to the petitioner. Therefore, according to his submission petition may be dismissed.

7. I have considered the submissions made by both the learned advocates and considering the fact that by order dated 14.8.1992 the benefit of higher pay scale has been given to the petitioner considering his total length of service including the service rendered by the petitioner prior to the request-transfer. The view taken by this Court in para 4 of the above referred case has covered the issue to the effect that, if any service rendered by the employee prior to request-transfer, same is required to be taken into account for any legal benefit which is available to the employee and same may not be treated as a service which will not be counted for any other benefit. Therefore, according to my opinion, question which has been raised in the present petition is covered by the decision of this Court in the case of Mulchandbhai Lavjibhai Patel and others (supra).

8. In respect to the second aspect, two orders dated 26.2.1999 and 17.3.1999 both are passed without giving any reasonable opportunity of hearing to the petitioner. It is not the case of the respondent that opportunity of hearing was given to the petitioner. Therefore, considering the fact that it is well settled principle laid down by the Apex Court that, in case, if any adverse orders passed by the department having an adverse effect on the status and prestige of the employee, then the reasonable opportunity must have to be given to the concerned employee. This view is taken by the Apex Court in the case of BHUPINDER PAL SINGH VERSUS DIRECTOR GENERAL OF CIVIL AVIATION & OTHERS reported in 2003-II-LLJ page 1032 [August,2003 Issue]. The relevant observations made in para 3 of the said decision are quoted as under:

> "Looking to the assertion made by the appellant that no opportunity was given to him during the investigation or inquiry based on

> which the order was passed on July 21, 1999 adversely affecting his rights and status in the absence of any counter affidavit denying the same either before the High Court or before this Court, there is no impediment or difficulty in holding that the order dated July 21, 1999 was passed in violation of the principles of natural justice. Even a perusal of the impugned order indicates that no opportunity was given to the appellant. The High Court proceeded on wrong assumption that the second inquiry was not a de novo inquiry. It appears to us that no opportunity was given to the appellant either during the inquiry made for the first time or in the second inquiry. Since the order passed is in clear violation of principles of natural justice, it is unnecessary for us to go into the merits of the other contentions raised. In the normal course, we would have set aside the order giving liberty to the respondent to hold a fresh inquiry. Since the appellant has superannuated and at this length of time, we think it is neither appropriate nor desirable to direct a fresh inquiry."

9. In view of the observations made by the Apex Court and considering the facts of the present case that by order dated 14.8.1992 the petitioner having the benefit of higher pay scale and enjoying the same, thereafter all of a sudden without giving any reasonable opportunity of hearing the order dated 26.2.1999 has been passed withdrawing the benefit of higher pay scale which has adversely affected the status and prestige of the petitioner, therefore, that order is contrary to the principles of natural justice. Similarly, the recovery order dated 17.3.1999 is also having the adverse consequences, therefore, recovery order is also contrary to the principles of natural justice. In view of these facts, both the orders dated 26.2.1999 and 17.3.1999 are required to be quashed and set aside.

10. In result, present petition is allowed. The orders passed by the respondent University dated 26.2.1999 and 17.3.1999, both are hereby quashed and set aside and it is directed to the respondent University to implement the order of granting the higher pay scale which has been passed in favour of the petitioner on 14.8.1992 and to grant all the available service benefits to the petitioner and fix the salary of the petitioner accordingly as per the order dated 14.8.1992 and, whatever the arrears available to the petitioner as per

the order dated 14.8.1992 same may be required to be paid by the respondent University within a a period of three months from the date of receiving the copy of this order. Rule is made absolute. No order as to costs.

(H.K.Rathod,J)

Jayanti*